Supreme Court, U.S.
FILED

(1) No. 941213 JAN 9 1995

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1994

STATE OF NEW YORK, *ET AL.*,
Petitioners,

MARYLAND PEOPLE'S COUNSEL, *ET AL.*,
Petitioners-Intervenors,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Respondents,

VOICE-TEL ENTERPRISES, INC., *ET AL.*,
Respondents-Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM J. COWAN
General Counsel to the
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
Telephone: (518) 474-8572
Attorney for Petitioner
New York State Department
of Public Service

Of Counsel:
LAWRENCE G. MALONE
Solicitor
Counsel of Record

January 6, 1995

BATAVIA TIMES PRINTING, INC.—Telephone (716) 344-2000

QUESTION PRESENTED

Does footnote 4 of *Louisiana Public Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355 (1986), hold that the Federal Communications Commission (FCC, Commission) may preempt areas of regulation expressly reserved to the states by Congress in order to implement goals that FCC officials have developed pursuant to the agency's general purpose?

PARTIES

Counsel

Richard E. Wiley, Rein & Fielding, Washington, D.C., for Petitioner Newspaper Association of America.

Frank W. Krogh and John F. Sturm, Washington, D.C., for Petitioner MCI Telecommunications Corporation.

Ellen S. LeVine, San Francisco, California, for Petitioners People of the State of California and the Public Utilities Commission of the State of California.

William J. Cowan, Albany, New York, General Counsel to Petitioner Public Service Commission of the State of New York.

Anne K. Bingaman, Assistant Attorney General, Department of Justice, Washington, D.C., for Respondents Federal Communications Commission and the United States of America.

Intervenor-Respondents' Counsel

JoAnne G. Bloom, Hoffman Estates, IL, for Illinois, Indiana, Michigan, Ohio and Wisconsin Bell Telephone Companies.

Robert J. Butler, Washington, D.C., for Information Industry Association.

Joseph P. Markowski, Squires, Sanders & Dempsey, Washington, D.C., for Information Technology Association of America.

Martin T. McCue, Washington, D.C., for United States Telephone Association.

Mary McDermott, White Plains, NY, for New York and New England Telephone Companies.

Robert B. McKenna, Denver, CO, and Washington, D.C., for U.S. West Communications, Inc.

M. Robert Sutherland, Atlanta, GA, for BellSouth Corp. and BellSouth Telecommunications, Inc.

John Thorne, Washington, D.C., for Bell Atlantic Telephone Companies.

James P. Tuthill, San Francisco, CA, for Pacific Bell and Nevada Bell.

Alfred W. Whittaker, Kirkland & Ellis, Washington, D.C., for Bell Operating Companies and United States Telephone Association.

James L. Wurtz, Washington, D.C., for Pacific Bell and Nevada Bell.

Michael J. Zpevak, St. Louis, MO, for Southwestern Bell Telephone Co.

Petitioners-Intervenors' Counsel

Robert J. Butler, Washington, D.C., for Information Industry Association.

Robert L. Duston, Schmeltzer, Aptaker & Shepard, PC, Washington, D.C., and John Glynn, Baltimore, MD, for Maryland People's Counsel.

Philip McClelland, Harrisburg, PA, for Pennsylvania Office of Consumer Advocate.

Joseph P. Markowski, Squires, Sanders & Dempsey, Washington, D.C., for Information Technology Association of America.

Randolph J. May, Sutherland, Asbill & Brennan, Washington, D.C., for Compuserve Inc.

Paul Rodgers, Washington, D.C., for National Association of Regulatory Utility Commissioners.

Veronica A. Smith, Harrisburg, PA, Pennsylvania Public Utility Commission.

Robert D. Vandiver, Tallahassee, FL, for Florida Public Service Commission.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	viii
OPINION AND ORDERS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	6
THE 1934 COMMUNICATIONS ACT	8
THE FCC ADHERES TO DUAL REGULATION FOR ITS FIRST FOUR DECADES	9
THE RISE AND FALL OF AGENCY GOAL PREEMPTION	9
THE FCC'S REVIVAL OF SECTION 151 PREEMPTION	12
REASONS FOR GRANTING THE WRIT	14
A. The Most Fundamental Reason Why The Ninth Circuit's Decision Should Be Reviewed Is That The Decision Conflicts Directly With The Plain Language Of The 1934 Communications Act	14
B. The Ninth Circuit's Decision Should Be Reviewed Because It Misreads This Court's Holding In *Louisiana*	16
1. The Ninth Circuit's Reading Of *Louisiana's* Footnote 4 As Creating An Impossibility Exception That	

Allows Agency Goal Preemption Is Belied By The Supreme Court's Unequivocal Rejection Of Agency Goal Preemption 17

2. The Ninth Circuit's Reading Of Footnote 4 As Creating An Impossibility Exception For Section 151 Preemption Is Belied By The Text From Which Footnote 4 Was Derived 19

3. The Ninth Circuit's Conclusion That Footnote 4 Creates An Impossibility Exception Allowing Agency Goal Preemption Erroneously Assumes That The *NCUC I and II* Cases Involved Only Section 151 Preemption 21

4. A Reading Of Footnote 4 In Context With The Role Of The Separations Process In *Louisiana* Demonstrates That The Footnote Could Not Possibly Have Been Intended To Create An Impossibility Exception Allowing Section 151 Preemption 23

C. The Court Should Grant Review Because In Allowing The FCC To Preempt Areas Of Regulation Expressly Reserved To The States By Congress, The Ninth Circuit Has Undermined The Will Of Congress And Invited Turnstile Agency Preemption 25

CONCLUSION 27

APPENDIX:

(Printed Under Separate Cover)

Opinion of The United States Court of Appeals For The Ninth Circuit (Filed October 18, 1994) A1

Report And Order of The Federal Communications Commission (Adopted November 21, 1991) A34

Transcript of Proceedings Before The Supreme Court of The United States (January 13, 1986) A155

47 U.S.C. §151 ..... A199

47 U.S.C. §152 ..... A200

TABLE OF AUTHORITIES

Cases:

American Tel. & Tel. v. Federal Communications Comm'n, appeal docketed, No. 82-1747 (D.C. Cir. 1980) 19

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 15

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) 16

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 16

Computer and Communications Indus. Ass'n v. Federal Communications Comm'n, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983) 11

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 16

Fort Stewart Schools v. Federal Labor Regulations Authority, 495 U.S. 641 (1990) . . . 14,15

GTE Serv. Corp. v. Federal Communications Comm'n, appeal docketed, No. 82-1752 (D.C. Cir. 1982) 19

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985) 16

Illinois Bell Tel. Co. v. Federal Communications Comm'n, 883 F.2d 104 (D.C. Cir. 1989) 6,13

In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), *on reconsideration*, 84 F.C.C.2d 50 (1980), *on further reconsideration*, 88 F.C.C.2d 512 (1981) 7

In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, *Phase I: Report and Order*, 104 F.C.C.2d 958 (1986), *on reconsideration*, 2 F.C.C.R. 3035 (1987) 7,12,13

In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket 90-623, 6 F.C.C.R. 7571 (1991) 2,12,13

Jones v. Rath Packing Co., 430 U.S. 519 (1977) .. 16

Louisiana v. Federal Communications Comm'n, 476 U.S. 355 (1986) ..... *passim*

National Ass'n of Regulatory Util. Comm'rs v. Federal Communications Comm'n, 880 F.2d 422 (D.C. Cir. 1989) 6,12,13

North Carolina Utilities Comm'n v. Federal Communications Comm'n, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) ..... *passim*

North Carolina Utilities Comm'n v. Federal Communications Comm'n, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) ..... *passim*

People of the State of California v. Federal Communications Comm'n, 905 F.2d 1217 (9th Cir. 1990) 7,13,14

Statutes:

28 U.S.C. §1254(1) 3

47 U.S.C. §151 . . . . . *passim*

47 U.S.C. §152 4,9

47 U.S.C. §152[a] 9

47 U.S.C. §152[b] . . . . . *passim*

47 U.S.C. §158 9

47 U.S.C. §§200 *et seq.* . . . . . *passim*

Other Authorities:

78 Cong. Rec. H10316 (daily ed. June 2, 1934) 8

78 Cong. Rec. S8822 (daily ed. May 15, 1934) 8

Hearings on H.R. 8301 Before the House Interstate and Foreign Commerce Committee, 73rd Cong., 2d Sess. 16 (1934) 8

H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 4 (1934) 15

H.R. 8301, 73rd Cong., 2d Sess. §210 (Feb. 27, 1934) (Committee Print) 8

Hearings on S. 6 Before the Senate Interstate Commerce Committee, 71st Cong., 2d Sess. 2180 (1930) 8

Hearings on S. 6 Before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess., 2133, 2152 (1930) 8

Hearings on S. 2910 Before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess. 179 (1934) 15

McKenna, 37 Fed. Comm. L.J. at 2 15

S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934) 15

S. _____, 73d Cong., 2d Sess. §210 (Feb. 10, 1934) (Confidential Comm. Print No. 2) 8

No. _____

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEW YORK, *ET AL.*,
Petitioners,

MARYLAND PEOPLE'S COUNSEL, *ET AL.*,
Petitioners-Intervenors,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*,
Respondents,

VOICE-TEL ENTERPRISES, INC., *ET AL.*,
Respondents-Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner New York State Department of Public Service respectfully requests that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Ninth Circuit entered on October 18, 1994 in the above-captioned case. The Ninth Circuit's decision directly conflicts with both the plain language of the Communications Act and this Court's holding in *Louisiana v. Federal Communications Comm'n*, 476 U.S. 355 (1986).

OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (1994 U.S. App. LEXIS 29001) is reprinted in the Appendix hereto (NY App.) at A1. The Federal Communications Commission's order *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards,* CC Docket 90-623, 6 F.C.C.R. 7571 (1991) (*Computer III* Remand Order) is reprinted in NY App. A34.

JURISDICTION

The Court of Appeals entered judgment on October 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

47 U.S.C. §151:

Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

(June 19, 1934, c. 652, Title I, §1, 48 Stat. 1064; May 20, 1937, c. 229, §1, 50 Stat. 189.)

47 U.S.C. §152:

Application of chapter

* * *

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and subject to the provisions of section 301 of this title and

subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

(As amended Dec. 20, 1991, Pub.L. 102-243, §3(b), 105 Stat. 2401.)

STATEMENT OF THE CASE

In enacting the 1934 Communications Act, Congress established a dual regulatory scheme, granting the FCC jurisdiction of interstate telecommunications, but prohibiting the FCC from intruding on the states' regulation of local telephone matters (47 U.S.C. §152[b]). The FCC's general purpose of maintaining an efficient interstate network was set forth in section 151 (of Title I), and its specific statutory responsibilities in regulating interstate communications were spelled out in section 200 *et seq.* (Title II) of the Act.

The Supreme Court in 1986 held that the FCC could not use goals developed by agency officials pursuant to section 151's general purpose as a basis for preempting the states' jurisdiction over intrastate matters. *Louisiana v. FCC*, 476 U.S. 355, 371-374 (1986). Three years later, the District of Columbia Circuit, in annulling an FCC preemption order, misinterpreted *Louisiana* as allowing FCC preemption of local telephone matters to achieve section 151 agency goals. *National Ass'n of Regulatory Util. Comm'rs v. Federal Communications Comm'n*, 880 F.2d 422, 429-430 (D.C. Cir. 1989)[1]

Following the lead of the District of Columbia Circuit, the Ninth Circuit Court of Appeals has upheld the FCC's use of a goal developed by agency officials pursuant to section 151 as a basis for preempting the 50 states' regulation of how

---

[1] It then relied on its dicta in a subsequent case to uphold agency goal (§151) preemption. *Illinois Bell Tel. Co. v. Federal Communications Comm'n*, 883 F.2d 104, 114-116 (D.C. Cir. 1989).

intrastate enhanced[2] telephone services should be provided.[3] Specifically, the Ninth Circuit has endorsed FCC preemption to implement the agency's section 151 goal of promoting the provision of enhanced services. *People of the State of California v. Federal Communications Comm'n*, 905 F.2d 1217, 1243 (9th Cir. 1990).

---

[2] Enhanced services combine basic telephone service with "computer processing applications [that] . . . act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different or restructured information, or involve subscriber interaction with stored information." *Final Decision, In re Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), 77 F.C.C.2d 384, 387 (1980).

[3] FCC officials initially decided in what is known as the *Computer II* decision that a section 151 goal of encouraging the provision of enhanced services would be frustrated if states did not require Bell Operating Companies to provide enhanced services through separate subsidiaries. *Final Decision, In re Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*) 77 F.C.C.2d 384 (1980), *on reconsideration*, 84 F.C.C.2d 50 (1980), *on further reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd, Computer and Communications Indus. Ass'n v. Federal Communications Comm'n*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). They then declared in *Computer III* that the same goal would be frustrated if states *did* require separate subsidiaries. *In re Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Third Computer Inquiry*), CC Docket No. 85-229, *Phase I: Report and Order*, 104 F.C.C.2d 958 (1986), *on reconsideration*, 2 F.C.C.R. 3035 (1987), *vacated, California I*, 905 F.2d 1217 (9th Cir. 1990); *on further reconsideration*, 3 F.C.C.R. 1135 (1988), *second further reconsideration*, 4 F.C.C.R. 5927 (1989). *Phase II: Report and Order*, 2 F.C.C.R. 3072, *vacated, California I*, 905 F.2d 1217 (9th Cir. 1990), *on reconsideration*, 3 F.C.C.R. 1150 (1988), *on further reconsideration*, 4 F.C.C.R. 5927 (1989).

THE 1934 COMMUNICATIONS ACT

When Congress created the FCC in 1934, the telephone system, as it is now, was predominately used to carry local (intrastate) calls. 78 Cong. Rec. H10316 (daily ed. June 2, 1934).[4] Congress, therefore, took pains to assure that the FCC could not use its jurisdiction over interstate calls to intrude on the states' well-established authority over intrastate matters. 78 Cong. Rec. S8822 (daily ed. May 15, 1934).[5] Specifically, it enacted section 152(b) of the Act to fence off intrastate regulation to the states. Section 152(b) states in pertinent part:

> Except as provided in sections 223 or 224 and 225 of this title and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, *nothing in this chapter* shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio or any carrier, . . . (emphasis added).[6]

---

[4] Of course, telephone equipment (poles, switches, and so on) was used, as it is now, to transmit both intrastate and interstate calls.

[5] During Senate hearings, Senator Dill invited state commission representatives to submit language reserving this authority to the state commissions. *Hearings on S. 6 Before the Senate Interstate Commerce Committee*, 71st Cong., 2d Sess. 2180 (1930). *See also Hearings on H.R. 8301 Before the House Interstate and Foreign Commerce Committee*, 73rd Cong., 2d Sess. 16 (1934) (statement of Dr. Stewart). For the state proposals, *see* S. _____, 73d Cong., 2d Sess. §210 (Feb. 10, 1934) (Confidential Comm. Print No. 2); H.R. 8301, 73d Cong., 2d Sess. §210 (Feb. 27, 1934) (Committee Print).

[6] *See Hearings on S. 6 Before the Senate Interstate Commerce Committee*, 73d Cong., 2d Sess. 2133, 2152 (1930) (statements of Sen. Dill); *id.* at 2179 (statement of Sen. Smith); *id.* at 2141 (statement of Sen. Brookhart) (expressing Congress' intent to "safeguard the rights of the States . . .").

Thus, the Communications Act carefully crafted a system of dual regulation, assigning the FCC jurisdiction of interstate calls and reserving the regulation of intrastate telephone service to the states.[7]

THE FCC ADHERES TO DUAL REGULATION FOR ITS FIRST FOUR DECADES

For its first 40 years, the FCC generally followed Congress' blueprint for state/federal regulation. With the FCC supervising interstate calls and the 50 states regulating local matters, the primitive telephone network of the 1930's became the most reliable, technologically advanced and affordable system in the world.

THE RISE AND FALL OF AGENCY GOAL PREEMPTION

The first significant instance of FCC preemption came in the 1970's. In two opinions, the Commission ordered telephone companies to permit customers to

---

[7] Chapter 5 of the Communications Act sets forth the FCC's authority to regulate telecommunications. Subchapter I of chapter 5 (§§151-158) is entitled General Provisions. Section 151 defines the Commission's general purpose of making available to the people of the United States a rapid and efficient interstate network "so far as practical" (§151). Section 152 provides a jurisdictional overlay to the telecommunications chapter; it assigns the FCC regulation of interstate communications (§152[a]) and expressly reserves to the states jurisdiction of "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service . . ." (§152[b]). Subchapter II (or Title II) of chapter 5 sets forth the FCC's specific powers and responsibilities over telephone common carriers.

attach their own telephones to the system and preempted the states from issuing contrary rulings. It justified its action in both cases on a claim that it could not fulfill its express statutory responsibilities under sections 201-205 of Title II (to assure interconnection to the interstate network and prohibit discrimination) without preempting state regulation.[8] The Commission also relied on section 151, claiming that it had to preempt to carry out a goal that it had conceived pursuant to its general duty of maintaining an efficient interstate network. In upholding the FCC's action, the Fourth Circuit relied primarily on the FCC's Title II jurisdiction, but it also endorsed section 151 as a source of preemptive power. *North Carolina Utilities Comm'n v. Federal Communications Comm'n*, 537 F.2d 787, 792-793 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (*NCUC I*); *North Carolina Utilities Comm'n v. Federal Communications Comm'n*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) (*NCUC II*).

The issue of agency goal preemption came before the Supreme Court several years later. In *Louisiana v. FCC*, 476 U.S. 355 (1986), the FCC contended that the Commission could not achieve a section 151 goal of modernizing the interstate network without preempting the states' regulation of intrastate depreciation charges because the cost of most telephone plant was allocated, or separated, to

---

[8] Sections 201 through 205 of the Communications Act authorize the Commission to ensure that an interstate system is maintained through physical connection (§201), that discrimination in the provision of communications services does not take place (§202), that tariffs are filed by interstate carriers (§203), that those filings are investigated (§204), and that just and reasonable rates are set (§205).

intrastate jurisdictions.[9] The FCC also argued that preemption of the states' depreciation regulation was needed to fulfill a Title II (§220) duty to set depreciation charges on interstate plant.

The Supreme Court rejected both FCC arguments. With regard to agency goal preemption, the Court emphasized that in-house policies developed under section 151 could *not* offer a basis for the FCC to violate the jurisdictional limitations of section 152(b). *Louisiana v. FCC*, 476 U.S. 355, 374 (1986). Declining to assess the wisdom of the FCC's section 151 goal (476 U.S. at 359), or whether the policy would be frustrated by state regulation (476 U.S. at 370), the Supreme Court stressed that allowing section 151 goals to be used to preempt section 152(b) activities "would be to grant to the agency power to override Congress" (476 U.S. at 374-375).

In rejecting the FCC's Title II argument, the Court drew a distinction between the facts of *Louisiana* and the *NCUC I and II* cases. Specifically, it distinguished the FCC's Title II depreciation duty, which the FCC could satisfy without preempting by setting depreciation charges on costs allocated to the interstate jurisdiction, from the FCC's non-separable Title II interconnection duty, which had been upheld as a basis for preemption in *NCUC I and II* because "state regulation would negate the federal tariff." 476 U.S. at 375 n.4.

---

[9] In support of agency goal preemption, the FCC cited a series of decisions, including the *NCUC* cases and *Computer and Communications Indus. Ass'n v. Federal Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (Computer II), wherein the District of Columbia Circuit Court of Appeals had held that the FCC could preempt state regulation solely to avoid a frustration of goals developed under section 151.

THE FCC'S REVIVAL OF SECTION 151 PREEMPTION

The FCC began to revive agency goal preemption by actually losing a preemption case. In what is known as its "inside wire decision," the FCC stated that state regulators[10] could not set the prices that telephone companies charged for on-premise wire connecting residential and single line business customers to the telephone network (inside wire). Although the District of Columbia Circuit Court of Appeals overturned the FCC's inside wire decision (holding that preemption was not needed to satisfy the FCC's section 151 goal of providing interstate telephone users choices with regard to the installation and maintenance of inside wire), it reiterated in dicta its pre-*Louisiana* (*Computer II*) conclusion that the FCC could rely entirely on a section 151 goal to preempt the states. *NARUC v. FCC,* 880 F.2d 422, 430 (D.C. Cir. 1989).

The District of Columbia Circuit Court of Appeals' dicta was soon cited by the Ninth Circuit in reviewing the FCC's *Computer III* decision. In that case, the FCC determined that its section 151 goal of promoting enhanced services would be impeded if the states required the Bell Operating Companies to provide these services through separate subsidiaries. *In re Amendment of Section 64.702 of the Commission's Rules and Regulations* (Third Computer Inquiry), Docket No. 85-229, *Phase I: Report and Order,* 104 F.C.C.2d 958 (1986), *on reconsideration,* 2 F.C.C.R. 3035 (1987). In remanding

---

[10] The Commission drew an exception for New York State.

Computer III to the FCC, the Ninth Circuit Court of Appeals followed a thought process similar to that of the D.C. Circuit's inside wire decision. *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990). While concluding that the FCC had not justified preemption on the facts, it added (citing the District of Columbia's inside wire dicta [905 F.2d at 1243, citing 880 F.2d at 429] and *Illinois Bell v. FCC*, 883 F.2d 104, 113-115 [D.C. Cir. 1989]) that a section 151 goal—standing alone[11]—could provide a basis for the FCC to preempt state regulation of section 152(b) activities.

On remand, the FCC, while narrowing its action, again preempted the states' regulation of the manner in which Bell Operating Companies provide intrastate enhanced services on the theory that preemption was needed to achieve a section 151 goal. The Ninth Circuit relied on its earlier *Computer III* decision to uphold the FCC's action.[12] For the reasons discussed below, the Court should review the Ninth Circuit's decision (NY App. A30).

---

[11] With the exception of this case, the progeny of *NARUC v. FCC* have involved Title II duties, as well as section 151 goals.

[12] The Ninth Circuit also upheld the FCC's use of a section 151 goal to preempt the states' formulation of standards inconsistent with the FCC rules on the treatment of Customer Proprietary Network Information (CPNI).

REASONS FOR GRANTING THE WRIT

A. The Most Fundamental Reason Why The Ninth Circuit's Decision Should Be Reviewed Is That The Decision Conflicts Directly With The Plain Language Of The 1934 Communications Act.

Section 151 defines the FCC's general purpose as regulating interstate telephone service "so as to make available, as far as possible, to all the people of the United States, a rapid efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Section 152(b) provides that "*nothing in this chapter*" should be read as giving the FCC jurisdiction of "charges, classifications, practices, services, facilities, or regulations *for or in connection with* intrastate communications service by wire or radio or any carrier" (emphasis added). The respondents do not deny that section 151 is part of "this chapter" or that enhanced services, the regulation of which is being preempted by the FCC in this case, fall within section 152(b). *California v. FCC*, 905 F.2d 1217, 1240-1242 (9th Cir. 1990). Therefore, the FCC is admittedly using goals formulated under section 151 to preempt the states' regulation of section 152(b) services.[13] Such action is prohibited by the plain language of section 152(b).

As this Court has indicated, one need not search for legislative intent when legislation is unambiguous, as is the case with section 152(b). *Fort Stewart*

---

[13] The FCC may lawfully develop and implement an array of goals under section 151. It simply may not use the goals to preempt state regulation of section 152(b) activities. *Louisiana v. FCC*, 476 U.S. 355, 359 (1986).

Schools v. Federal Labor Relations Authority, 495 U.S. 641 (1990); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Nonetheless, the legislative history of the Communications Act further establishes that the 1934 Congress flatly rejected any notion of the FCC preempting state regulation of intrastate [§152(b)] telephone services to achieve agency goals conceived under section 151's general purpose language.

"The question of an appropriate division between federal and state regulatory power was a dominating controversy in 1934." McKenna, 37 Fed. Comm. L.J. at 2. The controversy was resolved when section 152(b) reserved "to the States exclusive jurisdiction over intrastate telephone and telegraph communication," notwithstanding the FCC's general purpose of maintaining an efficient interstate network. S. Rep. No. 781, 73d Cong., 2d Sess. 3 (1934); *see also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934).[14] As this Court recognized, section 152(b) provided expressly that "[n]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . . ." *Louisiana v. FCC*, 476 U.S. 355, 373 (1986).

The Ninth Circuit's decision, in allowing the FCC to regulate intrastate services, directly conflicts with section 152(b). The decision, therefore, should be reviewed.

---

[14] As indicated by Committee Chairman Dill, the goal of Congress was "to protect the State commissions against being overridden by this Commission." Hearings on S. 2910 Before the Senate Interstate Commerce Committee, 73d Cong., 2d Sess. 179 (1934).

B. The Ninth Circuit's Decision Should Be Reviewed Because It Misreads This Court's Holding In *Louisiana*.

When federal action attempts to preempt activities traditionally regulated by states, such as telephone service, the Court " 'start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress'." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (*quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 [1977]). Further, this Court has long held that general purpose language, such as that found in section 151, cannot provide a basis for preemptive power, much less authority to preempt activities traditionally regulated by the states. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617 (1992); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-634 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

In attempting to justify its use of a section 151 goal to preempt a traditional area of state regulation, the FCC in *Louisiana* had to establish that such preemption was clearly envisioned by Congress. It could not do so because section 152(b) unequivocally admonished that, notwithstanding other provisions of the chapter, the FCC could *not* regulate intrastate services. 476 U.S. at 371-374. Thus, the Court held that the FCC could not use a section 151 goal to preempt state regulation of a section 152(b) activity. *Id.*

The Ninth Circuit's affirmance of the FCC's use of a section 151 goal to preempt the states' regulation of section 152(b) services turns on an assumption that footnote 4 in *Louisiana* endorsed such preemption. The assumption is belied by (1) *Louisiana's* unequivocal rejection of section 151 preemption; (2) the fact that the text from which footnote 4 was derived had nothing to do with section 151 preemption; (3) the fact that the *NCUC I and II* cases, cited in footnote 4, mainly concerned Title II preemption; and (4) the manner by which footnote 4 distinguished the Fourth Circuit's allowance of preemption in *NCUC I and II* from *Louisiana's* rejection of preemption.

1. The Ninth Circuit's Reading Of *Louisiana's* Footnote 4 As Creating An Impossibility Exception That Allows Agency Goal Preemption Is Belied By The Supreme Court's Unequivocal Rejection Of Agency Goal Preemption.

The Ninth Circuit's decision reads footnote 4 of *Louisiana* as permitting the FCC to preempt state regulation of local telephone matters when state regulation would make it more expensive or difficult to achieve the Commission's section 151 policies (an "impossibility" exception). The most fundamental problem with its position is that the Court in *Louisiana* never even discussed (much less applied) such a test (476 U.S. at 370-374). Rather than analyze whether state regulation would thwart, impede or render impossible the FCC's section 151 policy of plant modernization, the Court noted that it did "not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have the authority to enforce,

as it sees fit, practices which it believes would best effectuate this purpose." 476 U.S. at 359. "[We cannot accept] an argument that the FCC may . . . take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself."[15] 476 U.S. at 374.

If the Court had concluded in *Louisiana* that agency goal preemption would be allowed if it was needed to effectuate a section 151 goal, the FCC might very well have prevailed because the allocation of 75% of joint costs to the states arguably made it difficult to achieve the FCC's section 151 goal of modernizing the network by increasing depreciation charges for interstate costs only. The FCC did not prevail, however, because *Louisiana's* only semblance of an impossibility test concerned whether state regulation would prevent the FCC from carrying out its Title II (§220) duty and, as indicated, the answer was no. Thus, the Ninth Circuit has most certainly erred in reading *Louisiana* as endorsing a section 151 agency goal exception to section 152(b)'s preemption ban.[16]

---

[15] The Court also expressly rejected various cases cited by the FCC in support of agency goal preemption, including *NCUC I and II* (476 U.S. at 374).

[16] As discussed at length in a separate petition for certiorari being filed by California, the Ninth Circuit has not only erred in allowing section 151 preemption, it has compounded its error by developing a test for section 151 preemption that is far more lenient than that alluded to in *Louisiana* for Title II preemption. *See* 476 U.S. 375 n.4 and 476 U.S. 376 n.5. Indeed, the Ninth Circuit would allow section 151 preemption upon a showing that state regulation adds expenses or introduces operational difficulties to FCC goals (NY App. A31).

2. The Ninth Circuit's Reading Of Footnote 4 As Creating An Impossibility Exception For Section 151 Preemption Is Belied By The Text From Which Footnote 4 Was Derived.

When one carefully reads the specific paragraph of text in *Louisiana* that is explained by footnote 4, it becomes clear that the footnote could not have been intended to endorse section 151 agency goal preemption. Rather than make the slightest reference to section 151 preemption, the text rejects a Title II, *section 220*, claim of AT&T and GTE "that the FCC cannot help but preempt state depreciation regulation of joint plant if it is to fulfill its *statutory obligation and determine depreciation* for plant used to provide service . . ." (emphasis added; 476 U.S. at 375).[17] The text had nothing to do with section 151.

While recognizing that the text to which footnote 4 related "discussed a Title II function," the Ninth Circuit nonetheless ascribed no "significance to this placement" because "[t]he argument that the Court made with respect to Title I on the preceding page, that section 152(b) of the Act 'constitutes . . . a congressional *denial* of power to the FCC' to regulate, *id.* at 374, applied to Title II as well as Title I" (NY App. A30-A31). As a threshold matter, the Ninth Circuit has ignored the sequence of the *Louisiana* opinion. For four pages

[17] AT&T and GTE had, in fact, sought judicial review of an earlier FCC decision (89 F.C.C.2d at 1097) not to preempt state depreciation regulation, arguing that section 220 mandated preemption. *American Tel. & Tel. v. Federal Communications Comm'n, appeal docketed*, No. 82-1747 (D.C. Cir. 1980) and *GTE Serv. Corp. v. Federal Communications Comm'n, appeal docketed*, No. 82-1752 (D.C. Cir. 1982). The appeals were withdrawn when the FCC, upon reconsideration, reversed its position and preempted (92 F.C.C.2d 864).

preceding the text from which footnote 4 was derived, the Court analyzed and then rejected the FCC's section 151 argument. 476 U.S. at 370-374. Then, having turned to the respondents' Title II claims (476 U.S. at 375-379), the Court distinguished its rejection of section 220 (Title II) preemption from *NCUC's* allowance of sections 201-205 (Title II) preemption. It would have been nonsensical for the Court to have backtracked at that point and to have crafted an exception to its earlier, unqualified rejection of section 151 agency goal preemption.

More importantly, the Ninth Circuit's observation that section 152(b)'s jurisdictional fence applies to the FCC's Title II duties, as well as the FCC's general purpose under section 151, does not support the Ninth Circuit's assumption that allowing Title II preemption would also endorse section 151 preemption. A case can be made that the FCC should be able to preempt section 152(b) activities in order to carry out Title II duties; the argument being that Congress would not have entrusted the FCC with an express statutory duty and then have defeated its ability to execute that duty by barring it from preempting state regulation that negated the FCC's ability to fulfill its Title II responsibility.[18] Such an argument cannot be made, however, for section 151 preemption. Far from being congressional directives, agency goals culled from general purpose language are the handiwork of government officials. They are developed in a non-legislative setting and may therefore change not only with administrations, but with promotions, changes in political climate or even individual epiphanies.

[18] Of course, the Supreme Court did not have to reach this question in *Louisiana* because the separations process allowed the FCC to set interstate depreciation rates without preempting.

The argument for section 151 preemption therefore boils down to a claim that the FCC may take over the regulation of areas expressly reserved to the states by Congress by showing that preemption is needed to carry out any of the various goals related to an efficient interstate network. As *Louisiana* stated in rejecting such a theory, "we might be inclined to accept this broad reading of section 151 were it not for the express jurisdictional limitations on FCC power contained in section 152(b) . . . . [T]his provision fences off from FCC reach or regulation intrastate matters . . . . Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC." 476 U.S. at 370.

3. The Ninth Circuit's Conclusion That Footnote 4 Creates An Impossibility Exception Allowing Agency Goal Preemption Erroneously Assumes That The *NCUC I and II* Cases Involved Only Section 151 Preemption.

In interpreting footnote 4 as crafting an exception to the Court's rejection of agency goal preemption, the Ninth Circuit read the footnote as distinguishing the Court's rejection of the FCC's section 151 argument from the Fourth Circuit's prior allowance of section 151 preemption in *NCUC I and II*. An examination of the footnote in context with *NCUC I and II* demonstrates that the Ninth Circuit is incorrect.

As discussed above, footnote 4 distinguished *Louisiana's* rejection of AT&T's and GTE's Title II argument from *NCUC*. In doing so, it described *NCUC I and II* as cases:

where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation. See, *e.g.*, *North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (CA4), cert. denied, 429 U.S. 1027 (1976), and *North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036 (CA4), cert. denied, 434 U.S. 874 (1977) (Where FCC acted within its authority to permit subscribers to provide their own telephones, preemption of inconsistent state regulation prohibiting subscribers from connecting their own phones unless used exclusively in interstate service upheld since state regulation would negate the federal tariff).

Both the FCC and the Fourth Circuit in *NCUC I and II* relied primarily on *Title II* statutory preemption (§§201-205) to justify preempting state interconnection practices. *NCUC I*, 537 F.2d at 792,[19] 793; *NCUC II*, 552 F.2d at 1041, 1044. Footnote 4 merely distinguished *Louisiana's* rejection of section 220 depreciation preemption, which was not permissible, from *NCUC I's and II's* acceptance of Title II (§§201-204) preemption "since state regulation would negate the federal tariff." 476 U.S. at 375-376 n.4. Inasmuch as the opinion had previously rejected *NCUC I and II* as a basis for section 151 preemption (476 U.S. at 373, 374) and the text explained by footnote 4 had nothing to do with section 151 preemption, reading the footnote as endorsing section 151 preemption simply makes no sense.

---

[19] In *NCUC I*, for example, the Fourth Circuit stated, "[i]t is in connection with the Commission's efforts to discharge *its responsibilities under sections 201 through 205* and the alleged frustrating effect of countervailing state action that this controversy about jurisdiction . . . has arisen" (emphasis added; 537 F.2d at 792).

4. A Reading Of Footnote 4 In Context With The Role Of The Separations Process In *Louisiana* Demonstrates That The Footnote Could Not Possibly Have Been Intended To Create An Impossibility Exception Allowing Section 151 Preemption.

As indicated, the text elucidated by footnote 4 rejected the FCC's section 220 preemption argument because the allocation of joint costs to the state and federal jurisdictions allowed the FCC to meet its section 220 duty of setting depreciation charges on interstate costs without preempting. 476 U.S. at 375. Footnote 4 distinguished the Court's rejection of section 220 preemption from the Fourth Circuit's allowance of interconnection (§§201-205) preemption by noting that while "it is certainly possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has been made" (476 U.S. at 375 [text]), "it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation" in *NCUC I and II*. 476 U.S. at 375 n.4. Inasmuch as the separability of costs strengthened, rather than weakened, the FCC's section 151 position in *Louisiana*, it would have been completely illogical for footnote 4 to have referred to the separations process in explaining the Court's rejection of the FCC's section 151 policy argument. That is, the Court rejected the FCC's section 151 agency goal preemption argument *despite the fact* that the separation of joint costs arguably made preemption necessary to avoid frustration of the FCC's modernization policy. Thus, footnote 4 *only* makes sense (and then it makes complete sense) if it is read as distinguishing the Court's rejection of the FCC's Title II (§220) depreciation argument from the Fourth Circuit's acceptance of the FCC's Title II (§§201-205) interconnection argument.

The linchpin of the Ninth Circuit's preemption decision (its reading of footnote 4 as creating an impossibility exception allowing section 151 preemption) therefore cannot be correct. It flies in the face of (1) the Court's rejection of policy preemption without the slightest mention of an impossibility test; (2) the fact that the text explained by footnote 4 had nothing to do with section 151 preemption; (3) the fact that the *NCUC* cases addressed in footnote 4 concerned Title II, as well as section 151, preemption; and (4) the fact that the separability of joint costs supported the FCC's agency goal preemption argument.

C. The Court Should Grant Review Because In Allowing The FCC To Preempt Areas Of Regulation Expressly Reserved To The States By Congress, The Ninth Circuit Has Undermined The Will Of Congress And Invited Turnstile Agency Preemption.

The states argued in *Louisiana* that allowing the FCC to use goals developed under section 151 to infringe on areas reserved to the states by Congress would create a slippery slope leading to FCC regulation of local matters (NY App. A169, A172-A173). During the Solicitor General's defense of the FCC's action, the Court invited him to address the states' contention. The Solicitor General responded:

> In this case, although the Court of Appeals spoke in terms of section 1 [151 policy preemption], the Commission was very assiduous to rely on section 220(b), which specifically spoke about depreciation. So if there is a slippery slope here, the FCC has not sought to put its foot on it. It has rested firmly on section 220(b). (NY App. A177-A178).

That is, rather than argue that there were definable limits to section 151 preemption, the Solicitor General chose to emphasize the FCC's case for Title II preemption.

In approving section 151 preemption, the Ninth Circuit has endorsed the slippery slope that the Court rejected in *Louisiana*. Indeed, the lower court's decision empowers FCC officials to preempt whatever state regulation stands in the way of an endless array of in-house goals that they may properly glean from section 151's broad language.

Instead of a dual regulatory system, with state regulators developing new means of improving local telecommunications services, the Ninth Circuit's opinion, if allowed to stand, would leave the nation with a "one fits all" agenda. Such a system would stifle, rather than encourage, innovation and it would diminish the ability of state regulators to protect local customers against adverse rate impacts, service degradation and inequitable capital investment. Moreover, it would directly defy the will of Congress by rendering section 152(b) inconsequential.

CONCLUSION

For the reasons set forth herein, Petitioner requests that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

WILLIAM J. COWAN
General Counsel to the
Public Service Commission
of the State of New York
Three Empire State Plaza
Albany, New York 12223-1350
Telephone: (518) 474-8572
Attorney for Petitioner
New York State Department
of Public Service

Of Counsel:
LAWRENCE G. MALONE
Solicitor
Counsel of Record

Dated: January 6, 1995
Albany, New York